

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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TOLIN, :
Plaintiff : 08cv1811

-against- :
United States Courthouse
Brooklyn, New York

WASHINGTON, et al :
Defendants. : January 9, 2009
10:00 o'clock a.m.

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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN GLEESON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: JEFFREY BARNES, ESQ.

For the Defendant: REED SMITH LLP
BY: ANDREW B. MESSITE, ESQ.
LUANNE K CHU, ESQ.

Court Reporter: Burton H. Sulzer
225 Cadman Plaza East
Brooklyn, New York
(718) 613-2481

Proceedings recorded by mechanical stenography, transcript
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1 (Open court-case called-appearances noted.)

2 THE COURT: Good morning. Would you like to be
3 heard in support of your motion to dismiss?

4 MR. MESSITE: I would, your Honor, thank you. B&C
5 seeks by this motion to dismiss plaintiff Tolin's four current
6 causes of action: aiding and abetting fraud, conspiracy to
7 defraud, aiding and abetting breach of fiduciary duty and a
8 claim that we violated GBL 349.

9 I'd like to start with a discussion of the aiding
10 and abetting and conspiracy claims. I don't think there's any
11 dispute that these claims are dependent upon the existence of
12 a valid underlying fraud claim of Tolin against defendant
13 Washington, the ostensible mortgage broker here.

14 Even accepting Tolin's allegations in the complaint
15 as true for purposes of the motion, these claims can't be
16 sustained. The fraud that's alleged is that Washington
17 purportedly deceived Tolin into believing he was going to
18 receive a 5.5 percent interest rate mortgage. He was
19 refinancing an investment property. None of that is in
20 dispute.

21 There are any number of problems with the underlying
22 fraud claim, and I'd like to focus on the justifiable reliance
23 that Tolin could have had. In each of Tolin's three pleadings
24 so far he's alleged that Washington advised him in
25 February 2005 that she could get him a new loan at 5.5 percent

1 and it would take less than a week to do so.

2 Tolin next alleges that a month later, in
3 March 2005, he was presented with certain loan documents,
4 including a loan application which he concededly signed.
5 There is no dispute that the loan application references a
6 loan being sought at 7.75 percent.

7 Given that the loan application Tolin signed and
8 submitted referenced not a 5.5 percent rate but a 7.75 rate --

9 THE COURT: Was that application 7.55 percent fixed
10 rate.

11 MR. MESSITE: Yes. It's hard to understand even at
12 that point how there could be justifiable reliance that he was
13 getting a 5.5 percent interest rate.

14 Again, Tolin is an attorney, not any sort of
15 unsophisticated layman. A month later, Tolin alleges -- I
16 guess we're talking about May 1st now, several months past the
17 initial conversation where Washington promised that she would
18 get him a 5.5 percent mortgage within a week.

19 Now we're into May and Tolin allegations that he's
20 presented with a second set of loan document, this time the
21 interest rate is filled in, in blank, and they supposedly have
22 a conversation, and Tolin alleges in his first 2 pleadings
23 that Washington tells him that the lender is ensuring that he
24 gets the rate promised.

25 THE COURT: This is what, alleged in the first

1 complaint and, just so I have the chronology down, closes
2 May 3rd?

3 MR. MESSITE: May 3rd.

4 THE COURT: When is the second loan application in
5 blank allegedly filled out?

6 MR. MESSITE: It appears from the allegations in the
7 complaint that that it's two days before the closing.

8 THE COURT: All right.

9 MR. MESSITE: Tolin doesn't allege that 5.5 percent
10 was filled into the blank, just that it was presented to him
11 in blank. Two days later he shows up for the closing. Even
12 assuming that --

13 THE COURT: When does it go from 120 to 160, right
14 there in early May?

15 MR. MESSITE: When he's presented with the second
16 set of loan documents, now \$160,000 is referenced. There's a
17 bit of a disconnect between the initial two pleadings and the
18 current pleading about that figure. In the first 2 pleadings,
19 Tolin seems to be saying, I didn't want that money, I wanted
20 \$120,000. That was a mistake that was going to be corrected.

21 In the present pleading, the allegation seems to be
22 that somehow that \$160,000 was an integral part of him
23 agreeing to the loan.

24 THE COURT: In the current pleading it's alleged
25 that Washington gets 40 of that 160?

1 MR. MESSITE: No. I don't think that there's any
2 reference in the existing pleading to the subsequent
3 transaction between Washington and Tolin, but I believe in
4 the --

5 THE COURT: Am I hallucinating or was there a
6 prior pleading --

7 MR. MESSITE: In the prior pleadings there's a
8 reference that he lent her a portion of the loan proceeds but
9 it's a lower number -- \$10,000.

10 MS. CHU: Ten.

11 THE COURT: Yes.

12 MR. MESSITE: In the first two pleadings there are
13 two references that no longer appear. The first that is a
14 year before any of this, Tolin agrees to put Washington's
15 home, title to her home in his name for 30 days, and then
16 there's this allegation that post closing he loaned her part
17 of the loan proceeds and then spent much time trying to get
18 those monies repaid. Those allegations aren't in the present
19 pleading.

20 Tolin shows up on May 3rd. Even assuming -- and I
21 don't understand how anyone could have justifiable reliance
22 that he was going to get a 5.5 percent fixed rate loan given
23 the facts that he alleges, but there's no dispute that he
24 shows up on May 3rd at the closing and then understands that
25 that's not the loan being presented to him.

1 In all three of his pleadings he acknowledges that
2 he understood at the closing that the interest rate that he
3 was going to be obtaining was in excess of nine percent. How
4 then can Tolin argue that Washington defrauded him?

5 Or, phrased another way, how could Tolin have
6 justifiable reliance at that point that he was going to get a
7 5.5 percent loan once he knew otherwise? Tolin could have
8 walked away. Even if Tolin had signed all the loan documents,
9 Tolin still had three days to rescind the loan. Tolin didn't
10 do any of those things. This is not a fraud argument.

11 THE COURT: You say even if he signed?

12 MR. MESSITE: Even if he signed. There is no
13 alleges that he had signed all the documents and then somehow
14 understood. In the course of the closing he realized -- and
15 one would think that, given all the strange occurrences of the
16 prior three months, with the 7.75 application, the blank
17 application, that anyone, particularly a lawyer, would look at
18 the loan documents and see what the actual interest rate was
19 and what the terms were. And clearly he does, he admits that
20 he understood at the closing that he was getting a nine
21 percent rate.

22 Your Honor, B&C submits respectfully this is not a
23 fraud argument, this is a duress argument. How can they claim
24 that they entered into this mortgage under false pretenses?

25 They may have shown up, their best case scenario at

1 the closing, thinking that, but they didn't enter into this
2 loan transaction or suffer any damages as a result of anything
3 that Washington told them because they understood what the
4 loan was when Tolin entered into it.

5 Counsel for Tolin vigorously disavows any duress
6 argument in their opposition papers and with good reason. The
7 duress argument is not any better than the fraud argument.

8 There are allegations in the complaint that
9 Washington knew that Tolin was arranging his financial affairs
10 around this closing, with no explanation as to what that
11 means; but, again, this is not Tolin's home.

12 There is no allegation that the home was in
13 foreclosure, much less that a sale was imminent. There are
14 simply to be facts pled to explain why he was not exercising
15 his free will in entering into this loan transaction.

16 Moreover, even if those facts had somehow been
17 alleged and there was some reason that Tolin simply had to
18 proceed with the loan transaction, once he understood the
19 terms. New York law doesn't allow you to accept the proceeds,
20 all which will were concededly used to either payoff his prior
21 mortgage or went directly into Tolin's pockets, you have to
22 immediately disavow that. It's garden variety ratification.
23 You can't keep the money for three years and then sue and
24 claim, oh, I was forced to enter into this loan transaction.

25 So B&C's position is there is no fraud that could

1 support an aiding and abetting and conspiracy to defraud claim
2 even if you accept Tolin's version of events here in total.

3 In terms of the breach of fiduciary duty claim --
4 excuse me, the aiding and abetting breach of fiduciary duty
5 claim, Tolin's argument seems to be that a fiduciary duty
6 existed here because of the unique relationship that Tolin and
7 Washington had, their 12-year relationship, which is detailed
8 in -- there is greater detail provided in the first two
9 pleadings as to the odd nature of that relationship, but, in
10 any event, the underpinning for the fiduciary relationship
11 seems to be their personal relationship.

12 In order to have an aiding and abetting a breach of
13 fiduciary duty claim, you have to have knowledge of the
14 fiduciary duty and knowledge of its breach.

15 There is a problem with both of those here. If they
16 have some personal knowledge that transforms the borrower and
17 mortgage broker relationship into a fiduciary one, how were is
18 B&C to know that? There are certainly no allegations of fact
19 in the complaint that would suggest that B&C had any inkling
20 that they had any sort of personal relationship.

21 Moreover, given the fact that there's no dispute
22 that the loan application that Tolin signed in March sought a
23 7.75 interest rate, how then is B&C to have knowledge that
24 Washington was purportedly promising him he was going to get
25 an interest rate two points -- more than two points lower than

1 what he was applying for?

2 That is the ostensible breach of fiduciary duty that
3 he was being promised -- falsely promised an interest rate
4 lower than he was going to get, but there is no allegation
5 that B&C knew and how could they on the facts that Tolin
6 himself alleges?

7 THE COURT: I understand your argument on that, but
8 it sounds likes an argument Washington would make.

9 I take it your argument wouldn't be any different if
10 those initial loan applications papers set forth 5.5 percent.

11 MR. MESSITE: If the initial loan application papers
12 had said 5.5 percent, we would be arguing, yes, there is no
13 fiduciary relationship that we could have known of and simply
14 because he applied for a 5.5 percent loan, that doesn't create
15 any knowledge on our part that she was promising and he was
16 going to get it.

17 But I think it's even more egregious here, where the
18 loan application that was submitted has an interest rate that
19 is more two points higher. And he certainly couldn't have
20 understood that she was promising him that rate under those
21 circumstances.

22 The final claim is the GBL 349 claim, and the claim
23 that he was deceived is still based on the same factual
24 allegation that Tolin deceived -- Tolin was deceived about the
25 loan that he was going to get.

1 There is no separate factual predicate for the GBL
2 349 claim and there's no claim that B&C itself did anything.
3 The hook here is that Washington and Gordon, Gordon & Gordon
4 were somehow B&C's agent. There is no allegation here that
5 B&C controlled the mortgage broker, nor that the mortgage
6 broker had the ability to bind B&C.

7 In fact, just taking Tolin's allegations, it's
8 obvious that Washington didn't have the ability to bind B&C
9 because the loan that B&C offered was in no way, shape or form
10 comparable to the loan Tolin was seeking.

11 The legal argument supporting agency here seems to
12 be that simply because B&C is an out-of-state lender and that
13 Gordon, Gordon & Gordon was a New York mortgage broker, that
14 B&C as a matter of law had to be operating through the local
15 mortgage broker, which makes the mortgage broker B&C's agent.

16 There is no authority to support that position and
17 it's counterintuitive. The lender does operate through a
18 local agent who closes the loan, but it's not the mortgage
19 broker, it's the closing attorney who actually attends the
20 closings on the lender's behalf. That is the agent, not the
21 mortgage broker.

22 We respectfully submit that each of these claims are
23 baseless as against B&C and should be dismissed as a matter of
24 law.

25 THE COURT: Thank you.

1 The final approval for this 9.6 percent interest
2 rate loan on May 2nd was issued through Peter Brown. Who is
3 he?

4 MR. MESSITE: I believe, your Honor, that that would
5 be someone employed by B&C.

6 THE COURT: That's B&C attorney?

7 MR. MESSITE: Not the closing agent. The closing
8 agent was Charles Liken. This is just simply a B&C employee.

9 THE COURT: All right. I take it your position is
10 that is B&C's agent in this, that the Gordons and Ms.
11 Washington are not acting as agents of B&C?

12 MR. MESSITE: Not B&C's agent in if way -- they're
13 talking about agent to close the loan. The agent to close the
14 loan is the closing attorney, Charles Liken, who signed all
15 the loan documents. I can pass them up if your Honor wants.

16 THE COURT: No thank you.

17 MR. MESSITE: My understanding is Peter Browning is
18 simply somebody at B&C internally that approved the loan
19 terms.

20 THE COURT: He's a B&C employee.

21 MR. MESSITE: Yes. He would have nothing to do with
22 the closing of the loan, only the approval of the loan.

23 THE COURT: All right. Sir.

24 MR. BARNES: Good morning, your Honor.

25 THE COURT: Good morning.

1 MR. BARNES: There were two arguments raised in the
2 motion to dismiss that I have not heard addressed, and I'm
3 assuming them to be abandoned, I want to make sure. This
4 jurisdiction residence argument as to Mr. Tolin's purported
5 lack of being a resident of Illinois, and the preemption
6 argument.

7 THE COURT: The subject matter jurisdiction, which
8 is only raised tentatively, appears to have drifted into the
9 wake. Do you agree?

10 MR. BARNES: I do, your Honor. That is with the
11 preemption argument?

12 MR. MESSITE: Your Honor, the preemption argument --

13 THE COURT: You don't need to argue it. We can
14 address the merits.

15 MR. BARNES: Thank you, your Honor.

16 First of all, your Honor, a large part of what.
17 Mr. Messite said has to do with defenses and argument and you
18 can see this throughout his response; meaningless rhetoric,
19 leaps of logic; Tolin will not be able to prove, et cetera, et
20 cetera. What Mr. Messite seems to be doing is confusing
21 pleading with proof.

22 One of the cases that I want to bring to the court's
23 attention first on the reliance issue that I think governs the
24 disposition of this motion is the Night Securities motion,
25 which we have cited in our response.

1 The same kind of procedural error was made in that
2 case, and the court said very specifically: On a motion to
3 dismiss, a plaintiff need only plead that he relied on
4 misrepresentations by the defendant since the reasonableness
5 of his reliance implicates factual issues whose resolution
6 would be inappropriate at this early stage, being a motion to
7 dismiss stage.

8 The same thing applies with regard to whether or not
9 representations were innocently or knowingly and intentionally
10 made as misrepresentations.

11 With respect to aiding and abetting, it is premature
12 in the present procedural context to decide whether
13 fiduciary -- the party -- innocently made false representation
14 on behalf of its principal. And they go on to discuss also
15 the factual question as to whether or not the special
16 relationship implicated a fiduciary duty.

17 THE COURT: The false representation in this case
18 being that even though the papers said 9.6 percent it would be
19 5.5 and there would be no adjustable rate?

20 MR. BARNES: It goes even further than that. As we
21 said in paragraph 29 of our second amended complaint, which
22 superseded the other two that were discussed at some length,
23 miss Washington said, when she presented these papers to my
24 client, Oh, that was a mistake. We specifically said that --
25 Mr. Messite seems to have glossed over that, but she said

1 that's a mistake, just sign it. We need to get this loan
2 going or some such language.

3 In other words, it was a mistake. You're going to
4 get your 5.5 regardless of what this says. Then we go to
5 closing and at the last minute, when Mr. Tolin has rearranged
6 all his financial affairs around this closing, oh, guess what,
7 take it or leave it.

8 So the misrepresentations were merely on multiple
9 levels. There was the original 5.5 --

10 THE COURT: What is the significance of "take it or
11 leave it?"

12 MR. BARNES: The significance of it is, Judge, that
13 at that point Mr. Tolin has relied on somebody he's known for
14 12 years, who is acting as an agent of the lender by virtue of
15 their own conditional loan approval that they will were
16 obviously --

17 THE COURT: Let me interrupt you for a second. What
18 is it that he's being told to take or leave?

19 MR. BARNES: The loan with the escalation, the
20 variable rate with the six point escalation.

21 THE COURT: So he's being given a choice -- he's a
22 lawyer, right?

23 MR. BARNES: Yes, sir.

24 THE COURT: He's being given a choice, take a 9.6
25 percent mortgage loan with the adjustable rate, escalation

1 rate, or leave it. That's the "take it or leave it"?

2 MR. BARNES: Correct.

3 THE COURT: And is that fraudulent? Is that duress?
4 He obviously took it, and he's a lawyer --

5 MR. BARNES: Understood.

6 THE COURT: A logical question anybody would ask is,
7 Well, gee, what are you complaining about?

8 Your arguments placed significance on the fact that
9 those are the only options he had. Fair enough. But what
10 does that mean, does that mean he was coerced into this or is
11 the fact that he was presented with only those two options
12 somehow fraud?

13 MR. BARNES: If you weave together the fiduciary
14 relationship that's coming out of this 12-year relationship
15 with Washington acting as an agent of Gordon, Gordon & Gordon
16 and leading him down the path for months and months and months
17 on the 5.5, then you go to closing and you've got 9.66 with a
18 six point escalation on a variable rate instead of the fixed
19 rate he was promised, that's akin to -- it is a fraud because
20 it's a constructive fraud, it's a breach of fiduciary duty and
21 it's a situation that comes about because of repeated
22 fraudulent misrepresentations, all of which --

23 THE COURT: From whence does the fiduciary duty
24 arise?

25 MR. BARNES: The special relationship he had with

1 Washington over 12 years.

2 THE COURT: A personal relationship?

3 MR. BARNES: Not so much personal. We have alleged
4 a 12 year relationship that they had, and what will come out
5 in discovery is that they had other business dealings where
6 Washington had acted for him as a broker.

7 THE COURT: What are the facts that warrant -- so
8 she takes advantage of that relationship, she says, I'm going
9 to get you 5.5 percent. The 7.5 percent is a mistake. That's
10 the first loan application. And they get to the closing and
11 the 9.6 percent is a mistake, you're really going to get 5.5
12 percent -- right?

13 MR. BARNES: He walked into the closing believing he
14 was going to get 5.5 until he looked at the documents and, Oh,
15 I'm sorry.

16 THE COURT: I understand your claim to be he also
17 walked out thinking he was going to get 5.5 percent; is that
18 right? She wasn't going to fix it later?

19 MR. BARNES: I don't think that has been alleged at
20 this point.

21 THE COURT: It's a weaker claim against the bank
22 than I thought. Okay, so he gets it. He feels terrible, he's
23 got to pay that much more and he has the escalation clause.

24 Whatever abuse of the relationship, breach of the
25 fiduciary duty might cause us to hold Miss Washington

1 accountable for something. What are the facts that warrant
2 charging this to the bank's account?

3 MR. BARNES: The bank was the one that gave the
4 approval the day before the closing, which was not disclosed.
5 They're the ones that railroaded this. They are the ones that
6 gave the 9 --

7 THE COURT: Stop. They gave the approval of the
8 loan that he signed the day before the closing.

9 MR. BARNES: Yes.

10 THE COURT: What is the significance of the day
11 before the closing?

12 MR. BARNES: Because they knew the closing was
13 coming up, they knew he was going to be forced into a position
14 of taking it or leaving, and that's what they shoved through.

15 THE COURT: So what? He's a lawyer and he took it.

16 MR. BARNES: When you say he's a lawyer, again that
17 goes to the reliance argument -- if we were here on summary
18 judgment and there was deposition testimony --

19 THE COURT: You have to allege a plausible claim.
20 I'm trying to assist you and articulate it in a way that makes
21 it seem more plausible to me than these kind of pleadings do.

22 The claim isn't making any sense to me. He's a
23 lawyer. He shows up at a closing. Now, I suppose it would
24 be nicer if he had some more time, maybe a couple of days
25 ahead of time, to decide whether he was going to take that 9.6

1 percent loan, but he doesn't get it, which is bad, but it's
2 not fraud.

3 I mean, I will accept your allegation as fair, but
4 that is not fraud. He takes it, he knows he's going to pay
5 that. Three years later he sues and says he's defrauded by
6 the bank because, you mentioned, they only approved it the day
7 before. What else, what are the other dimensions of the
8 fraudulent conduct by B&C?

9 MR. BARNES: Because my client had to assume that
10 when Washington was acting on behalf of the lending quoting
11 the rate, the rate was coming from the lender. The lender was
12 B&C all along. The lender was B&C when the 7.75 was signed;
13 the lender was B&C when the day before the closing they gave
14 the 9.6.

15 THE COURT: He found out he was wrong. Whatever
16 assumptions he had, he walked into the closing and he found
17 out, according to his own allegations, he was wrong.

18 How does that translate into fraud by B&C?

19 MR. BARNES: Because again, Judge, we're not
20 claiming direct fraud against B&C, they're on an aiding and
21 abetting claim. This whole fraudulent transaction could not
22 have been accomplished without their aid and assistance.

23 This is the only loan that they ever approved. They
24 gave it the day before the closing with no disclosure before
25 the closing. They are a cog go in the wheel.

1 THE COURT: They are certainly necessary because
2 without the mortgage loan I suppose we wouldn't be here.

3 MR. BARNES: There is no direct fraud claim against
4 them, it's only aiding and abetting.

5 THE COURT: It seems to me your theory is they're
6 aiding and abetting because of that, because without their
7 presence on the scene as the mortgage lender, Washington
8 couldn't have ripped off her friend, your client, Tolin, and
9 that is not fraud.

10 Granted, a mortgage lender had to be part of this,
11 but why does that brush them with the fraud that you allege
12 against Washington? It might be my fault, but I have a
13 complete blind spot on your theory.

14 MR. BARNES: Because, Judge, again, what I'm hearing
15 is, I'm hearing the court trying to justify the substantiation
16 of a direct fraud claim against B&C through a direct
17 representation of them rather than an aiding and abetting,
18 which comes out of the Sidley Austin kind of cases, the cog in
19 the wheel thing.

20 THE COURT: If I understood what you just said I
21 would tell you whether you're right, but I didn't understand
22 it. Let's stick with this case. I'm just repeating myself.

23 Any more argument you would like to make?

24 MR. BARNES: As I was listening to you earlier, if
25 we're going on the duress route --

1 THE COURT: Are we? It's your case. We're going on
2 a duress route?

3 MR. BARNES: A take it or leave it is a kind of
4 duress, I would agree on it.

5 THE COURT: Is it the kind of duress that you think
6 is cognizable as a cause of action here?

7 MR. BARNES: I'm not aware that New York has any
8 cause of action for adding and abetting duress.

9 THE COURT: It's a weird duress claim, that he is
10 subjected to the sort of compulsion that would constitute
11 duress under the applicable contract law, whatever that is, I
12 assume it's New York, and then he waits three years -- a
13 lawyer to wait three years after spending the money to
14 complain about it. But, you tell me, is that claim in the
15 case or not?

16 MR. BARNES: Which claim, the duress?

17 THE COURT: Duress.

18 MR. BARNES: Yes, under paragraph 22 it is. It
19 would have to be.

20 THE COURT: Okay. Anything else you want to say in
21 support of that facet of the cause of action?

22 MR. BARNES: Other than that we have alleged it for
23 pleading purposes?

24 THE COURT: Yes.

25 MR. BARNES: On that specific issue, not at this

1 time.

2 THE COURT: All right. Anything further in
3 opposition to the motion?

4 MR. BARNES: Other than what is in the moving
5 papers?

6 THE COURT: Yes. The opposition papers.

7 MR. BARNES: I just wanted to address the agency
8 argument very quickly.

9 THE COURT: Go ahead.

10 MR. BARNES: Again, what Mr. Messite's saying, there
11 was an agent to close the loan. As you asked, who is this guy
12 Brenner? There are no cases that I've seen cited by B&C that
13 says the agency principle is exclusive and applicable only as
14 to the type of theory he's talking about.

15 Agency is a broad concept, which is why I brought in
16 and cited the case law on ratification, which is why I cited
17 the case law with regard to an agent acting on behalf of the
18 principle, an agent in this context being the one who, through
19 Gordon, Gordon & Gordon, brought this loan in and made this
20 loan part of the transaction.

21 Washington being an agent of Gordon, at least as far
22 as my client knew, Gordon being an agent of B&C, pursuant to
23 the conditional loan approval they were at agent. There is no
24 case law saying -- on exclusivity saying they can't be an
25 agent, that Gordon and Washington can't be agents of B&C for

1 purposes of this transaction, there is no case law to that
2 effect.

3 THE COURT: Whose agent is a mortgage broker, the
4 mortgage lender's agent or the borrower's agent?

5 MR. BARNES: I've seen cases in other situations
6 that I'm handling around the country where they have been hit
7 with both hats, depending on how they act because they're
8 getting -- they may be getting a commission or some kind of
9 incentive from the lender for pushing the loans through,
10 because they're pushing high loans through because they are
11 getting a high commission because they are going all to be
12 securitized and also getting paid by the borrower.

13 THE COURT: I don't understand your claim though,
14 which is why I asked the question about from whence arises the
15 fiduciary relationship.

16 It doesn't seem to me that your claim rests on a
17 fiduciary relationship running from Washington to Tolin,
18 arising out of her role as a mortgage broker.

19 It's arising out of her 12-year relationship with
20 your client, right?

21 MR. BARNES: Yes.

22 THE COURT: Which makes it for difficult, in my
23 view, for you to tag the breach of that -- even assuming that
24 there is fiduciary relationships running all over the lot,
25 from the mortgage broker to the plaintiff, the mortgage lender

1 through the mortgage broker to the plaintiff -- assuming that
2 is true, it makes it for difficult, it seems to me, for you to
3 charge to the account of B&C this breach that you allege since
4 the nature of the fiduciary relationship isn't even the broker
5 to borrower relationship, it's this personal thing going on
6 between Tolin and Washington.

7 Do you agree with that?

8 MR. BARNES: Not entirely. What I'm trying --

9 THE COURT: How are they supposed to know that the
10 mortgage broker has this relationship with Tolin, such that
11 even though the bank keeps saying a higher interest rate he's
12 going to get a lower interest rate?

13 MR. BARNES: Well --

14 THE COURT: What is it about the facts that you've
15 alleged that make it plausible that B&C could even have been
16 aware of that?

17 MR. BARNES: We have alleged that in paragraph 20.
18 At all times material B&C engaged various agents such as
19 defendant GGG herein for the purpose of causing borrowers to
20 execute mortgage loans for the sole purpose of resale; thereby
21 defendant B&C relied on these local brokers to gain borrower
22 confidence ab initio so that the borrowers would feel
23 comfortable dealing and closing the loan with the local
24 broker.

25 THE COURT: So what? What's wrong with that?

1 What's wrong with anything that you just read?

2 MR. BARNES: Nothing, as long as they are up front
3 and honest.

4 THE COURT: What is it that you just read that makes
5 it plausible that B&C was aware of Washington's defrauding
6 your client?

7 They like to have mortgage brokers to get mortgage
8 loans that they can bundle and sell. They like mortgage
9 brokers because they instill confidence in the potential
10 borrowers in the community.

11 So what?

12 MR. BARNES: B&C allegedly gives him a 7.75 percent
13 loan, which the broker says is a mistake, and even assuming
14 they didn't know that, they are telling him, through the
15 broker, you've got 7.75, but yet the only thing they approve
16 the day before the closing is 9.66 on a variable.

17 They're saying one thing and they're changing it the
18 day before the closing and saying something else that is light
19 years different.

20 THE COURT: Is the 7.5 in an application for a loan?

21 MR. BARNES: Yes.

22 THE COURT: So it's an unapproved application for a
23 loan that Washington give your client, correct?

24 MR. BARNES: Yes.

25 THE COURT: So the connection between that and B&C

1 saying you can get a 7.75 percent loan eludes me.

2 MR. BARNES: The presumption is the lender all along
3 was B&C.

4 THE COURT: Whose presumption?

5 MR. BARNES: That was the only lender ever
6 discussed.

7 THE COURT: The presumption is they're the lender,
8 but I asked what you it was about those facts that suggested
9 that B&C said you could have a 7.5 percent loan.

10 MR. BARNES: 7.75 --

11 THE COURT: I'm sorry, whatever it was.

12 MR. BARNES: That B&C was the only lender ever
13 mentioned by Washington to my client. There was no other
14 lender mentioned.

15 THE COURT: It wasn't an approved loan for 7.75, was
16 it?

17 MR. BARNES: That's what Washington told my client
18 he had been approved for, that amount. That's where the rate
19 came from, albeit that she said it was a mistake.

20 THE COURT: I understand. Thank you, sir.
21 Anything further?

22 MR. MESSITE: I'd like to clarify two factual
23 issues. Your Honor asked about the mistake allegation and
24 seemed to be inquiring whether plaintiff was arguing that he
25 signed the documents and that Tolin had told him -- Washington

1 had told Tolin at closing that the document he was signing was
2 a mistake.

3 The only allegation of mistake is seven weeks
4 earlier, when she's first presented -- in March, it's the 7.75
5 percent rate that she tells Washington allegedly is the
6 mistake, nothing like that at closing.

7 With respect to that same March 8, 7.75 percent,
8 there is no allegation that on March 8th, Tolin was even told
9 by Washington that he had been approved for any rate, much
10 less the 7.75.

11 The only allegation is that that rate is a mistake
12 and that she would secure a mortgage at the promised rate.
13 It's paragraph 29 of the current pleading.

14 I don't have anything further.

15 THE COURT: Understood. Thank you. Thank you both.
16 I will take the motion under advisement.

17 MR. BARNES: Thank you very much. Have a good
18 weekend.

19 THE COURT: Thank you.

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